

DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings
825 North Capitol Street N.E., Suite 5100
Washington D.C. 20002

MARTHA MOSELEY
Petitioner,

v.

DEPARTMENT OF MENTAL HEALTH
Respondent

Case No.: C-01-80085

FINAL ORDER

I. Introduction

On September 13, 2001, Petitioner Martha Moseley, represented by the Office of the Long-Term Care Ombudsman, filed this action seeking an administrative hearing to review her discharge from a community residence facility (“CRF”) located at 4807 Iowa Avenue, N.W. (the “Iowa Avenue Facility”). Ms. Moseley alleged that the Department of Mental Health (“DMH”) had ordered her discharge from the Iowa Avenue Facility in violation of various provisions of the Nursing Home and Community Residence Facility Residents’ Protections Act of 1985, D.C. Official Code §§ 44-1001.01 *et seq.* (the “Act”). I held status conferences on September 17 and September 24, during which it appeared likely that Ms. Moseley would be permitted to return to the Iowa Avenue Facility, thereby achieving the result she sought in this case.

On October 1, 2001, the parties filed status reports stating that Ms. Moseley would return to the facility on the next day. Ms. Moseley’s counsel, however, urged that a hearing be held to address certain issues concerning both DMH’s authority to arrange for discharges from CRFs and its obligation to provide notice of any discharges that it arranges. After reviewing written

submissions from both Ms. Moseley and DMH, and after holding a subsequent status conference concerning these issues, I ruled that the case was not moot, relying upon the “voluntary cessation of allegedly illegal activities” exception to the mootness doctrine. Scheduling Order (November 9, 2001), citing *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *Baugh v. District of Columbia Dep’t of Consumer and Regulatory Affairs*, 611 A.2d 557, 557 n.1 (D.C. 1992). I further ruled that, due to the importance of the issues in the future operation of CRFs by and under the supervision of DMH, this case would be an appropriate one for the exercise of the discretion to issue a declaratory order granted by D.C. Official Code § 2-508. November 9 Order at 2. *See also* Order of October 12, 2001 (discussing both the voluntary cessation doctrine and the exercise of discretion to issue a declaratory order.) *Cf. Baugh*, 611 A.2d at 557 n.1 (even though petitioner had returned to facility, court ruled on her challenge to an alleged transfer because it involved a “short-term situation that can readily reoccur.”) DMH initially opposed the holding of a hearing after Ms. Moseley’s return to the Iowa Avenue facility. At the October 25, 2001 status conference, however, DMH joined in Ms. Moseley’s request for a hearing to resolve the issues presented in this case.

At a status conference held on November 21, 2001, the parties entered into certain stipulations concerning Ms. Moseley’s discharge from the Iowa Avenue Facility and the role of DMH in that discharge and in the operation of the facility. The parties further requested that I decide this case based upon the stipulations alone, without conducting an evidentiary hearing, because there are no genuine issues of material fact in dispute. The parties subsequently filed

briefs addressing the legal issues, and Ms. Moseley filed a reply brief. The record closed on December 20.¹

II. Findings of Fact

Based upon the parties' stipulations, which form the entire factual record in this matter, I make the following findings of fact:

1. The Community Residence Facility located at 4807 Iowa Avenue, N.W. (the "Iowa Avenue Facility") is privately owned, but is operated by the Department of Mental Health, and is staffed entirely by employees of the Department of Mental Health.
2. Petitioner, Martha Moseley, was discharged from the Iowa Avenue Facility shortly after July 26, 2001, when the Department of Mental Health decided that she could not return there from a nursing home where she had been staying for temporary rehabilitation.²
3. Ms. Moseley and her representative, as defined in the Nursing Home and Community Residence Facility Residents' Protections Act of 1985, D.C. Code

¹ Because Ms. Moseley's discharge was rescinded, issuance of this Order at this time is not inconsistent with D.C. Official Code § 44-1003.03(b) (decision due within seven calendar days after receipt of a hearing request, when the facility decides to discharge the resident) or D.C. Official Code § 44-1003.09 (decision due within 30 calendar days after receipt of a hearing request if the Mayor has discharged a resident). There are no comparable deadlines for a case such as this one, in which the discharge has been rescinded, but a declaratory order is to be issued.

² The November 26 Order, which contains the parties' stipulations, recited that Ms. Moseley had been in the nursing home for "temporary rehabilitation after surgery." In their briefs, however, both parties have agreed that Ms. Moseley did not have surgery and I have reflected this revision in the findings of fact. Whether or not Ms. Moseley's stay in the nursing home was due to surgery is not material to the disposition of this matter.

§ 32-1401(11), now codified as D.C. Official Code § 44-1001.01 (2001 ed.), did not receive prior notice of the transfer or prior notice of her right to contest the transfer by requesting a hearing. The Act required that Ms. Moseley receive such notice.

III. Conclusions of Law

The order of November 26 identifies four issues to be decided in this matter. They are:

1. Whether the owner of the Iowa Avenue Facility or the Department of Mental Health should have given the required notice.
2. If the Department of Mental Health should have given notice, whether the source of that obligation is D.C. Code § 32-1432, now codified as D.C. Code § 44-1003.02 (2001 ed.) (governing discharges by a facility), or D.C. Code § 32-1437, now codified as D.C. Code § 44-1003.07 (2001 ed.) (governing discharges by the Mayor).
3. If the Department of Mental Health should have given notice, whether it was entitled to rely upon the grounds for discharge permitted by D.C. Code § 32-1431, now codified as D.C. Code § 44-1003.01 (2001 ed.) (governing discharges by a facility), or whether it was limited to the grounds specified by D.C. Code § 32-1435, now codified as D.C. Code § 44-1003.05 (2001 ed.) (governing discharges by the Mayor).

4. If the Department of Mental Health should have given notice, who are the appropriate officials or employees to give notice?

November 26, 2001 Order at 2.

To place those issues in context, it is first necessary to set forth the substantive and procedural requirements mandated by the Act for the involuntary discharge of residents from CRFs and nursing homes.

A. The Legal Standards Governing Discharges

1. Discharges By A Facility

The Act provides for two different methods of discharging a resident from a CRF. Absent consent of the resident and his or her representative, the facility itself may discharge a resident on one of five grounds:

1. If the discharge is “essential to meet that resident’s documented health-care needs or to be in accordance with his or her prescribed level of care;”
2. If the discharge is “essential to safeguard that resident or one or more other residents from physical or emotional injury;”
3. “On account of nonpayment for his or her maintenance,” with certain exceptions not relevant here;
4. If the discharge is “essential to meet the facility’s reasonable administrative needs and no practicable alternative is available;” and

5. “If the facility is closing or officially reducing its licensed capacity.”

D.C. Official Code § 44-1003.01.

A facility that proposes to discharge a resident generally must give the resident and the resident’s representative at least 21 days written notice before the discharge or transfer takes place. D.C. Official Code § 44-1003.02. A resident’s representative may be designated by the resident or appointed by a court. D.C. Official Code § 44-1001.01(11)(A), (B). If no representative has been so designated or appointed, the Long-Term Care Ombudsman serves as the resident’s representative. D.C. Official Code § 44-1001.01(11)(C).

A resident wishing to challenge the facility’s discharge decision has a right to an administrative hearing before the discharge occurs. At the hearing, the facility must prove the existence of one of the five grounds listed above by clear and convincing evidence. D.C. Official Code § 44-1003.03(b), (c).

2. Discharges By The Mayor

The Act also authorizes the Mayor to discharge a resident, but both the grounds for discharge and the procedure for accomplishing a discharge are different. The parties agree that the Mayor’s authority under the Act with respect to discharges from the Iowa Avenue Facility has been delegated to DMH.

The Mayor may discharge a resident from a facility if

1. The facility is not licensed or is violating restrictions placed upon its license;
2. The Mayor has suspended, revoked, or refused to renew the facility’s license;

3. The facility is closing and has not made adequate arrangements for the relocation of its residents;
4. The facility has requested the Mayor's assistance in arranging a discharge to which the resident and the resident's representative have consented; and
5. The Mayor has determined that there is an emergency that poses an immediate danger of death or serious physical injury to the resident.

D.C. Official Code § 44-1003.05(a).

The Mayor also must follow different procedures in discharging a resident. In non-emergency situations, prior written notice must be given to the resident, the resident's representative and the facility (either to its licensee or administrator), but no specific advance notice period is required. D.C. Official Code §§ 44-1003.06, 44-1003.07. Before the discharge, the Mayor must provide an informal conference to the resident, the resident's representative and the Long-Term Care Ombudsman during which they may present any objections to the proposed discharge. D.C. Official Code § 44-1003.07(b). Upon request, the licensee or administrator of the facility also may have an informal conference, and the timely making of such a request (*i.e.*, within four days of receipt of notice of the discharge) will stay the discharge until the conference occurs. D.C. Official Code § 44-1003.06. In an emergency, the Mayor must give prior notice (oral or written) of the discharge to the resident and the facility's licensee or administrator, but need not provide written notice until after the discharge. D.C. Official Code § 44-1003.08.

When the Mayor exercises the authority to discharge a resident, either the resident, the resident's representative, or the licensee or the administrator of the facility may contest the

discharge by requesting an administrative hearing. D.C. Official Code § 44-1003.09. The hearing request must be made “[w]ithin 10 calendar days *after* a . . . discharge,” D.C. Official Code § 44-1003.09(a) (emphasis added), which means that the hearing is a post-discharge, not a pre-discharge right. *James v. Department of Mental Health*, OAH No. C-01-80067, at 2 (Order Regarding Petitioners’ Request for Hearing, June 22, 2001); *Commission on Mental Health Services v. Lamont*, OAH No. C-00-80007 at 3-4 (Order, May 16, 2000).

B. Timeliness of Ms. Moseley’s Hearing Request

A threshold issue that must be decided is whether Ms. Moseley’s hearing request was filed within the appropriate statutory deadline. The filing deadline depends upon whether the facility or the Mayor discharges the resident. If the facility does so, the deadline is seven calendar days after receipt of proper notice of the proposed discharge. D.C. Official Code § 44-1003.03(a)(1)(A). If the Mayor discharges the resident, the resident must request a hearing within ten calendar days after the discharge. D.C. Official Code § 44-1003.09(a). The parties have stipulated that Ms. Moseley’s discharge occurred “shortly after July 26, 2001,” and she filed her hearing request on September 13, 2001.

Regardless of whether Ms. Moseley’s discharge is viewed as the facility’s action under § 1003.01(a) or the Mayor’s action under §1003.05(a), I conclude that her hearing request was timely. If the discharge is considered as a discharge by a facility, she needed to file her request no more than seven days after receiving proper notice of a proposed discharge. The parties have stipulated, however, that Ms. Moseley never received the required notice of her proposed discharge. Consequently, the time for filing a hearing request pursuant to D.C. Official Code § 44-1003.02(a)(1)(A) never began to run and her September 13 filing was timely.

On the other hand, if Ms. Moseley's discharge is considered to be a discharge by the Mayor pursuant to D.C. Official Code § 44-1003.05(a), she needed to file within ten days after her actual discharge. While the parties have not stipulated to the exact date of her (now-rescinded) discharge, I interpret the stipulation's term "within a few days of July 26, 2001" to mean that the discharge occurred no more than a week after that date. At first glance, it would appear that the September 13 filing was too late if Ms. Moseley's discharge is viewed as one accomplished by the Mayor. The failure to file an administrative appeal within a mandated time limit is usually a jurisdictional bar to consideration of the matter, but an agency must give notice of both its decision and the opportunity to contest the decision before that bar can arise. *Zollicoffer v. District of Columbia Public Schools*, 735 A.2d 944, 945-46 (D.C. 1999). Because Ms. Moseley never received proper notice of the decision to discharge her or of her opportunity to contest it, the time for challenging a Mayor's discharge also had not begun to run when she filed her hearing request on September 13. Thus, whether the facility or the Mayor discharged Ms. Moseley, her hearing request was timely.³

C. Was Proper Notice Given?

The parties have stipulated that Ms. Moseley had a right to prior notice of her discharge from the Iowa Avenue facility and that she did not receive it. The discussion of timeliness immediately above shows that advance notice was due regardless of whether Ms. Moseley's discharge is considered a discharge by the facility or by the Mayor. Thus, her discharge was unlawful because she did not receive the notice to which she was entitled.

³ The interval between Ms. Moseley's discharge and the filing of her hearing request was less than two months, a relatively short period. I do not decide whether a failure to give the notice required by D.C. Official Code § 44-1003.02(a) or D.C. Official Code § 44-1003.07(a) would authorize the filing of a challenge to a discharge at any time, even years after the discharge took place.

The first issue for decision identified in the November 26 Order is whether the owner of the Iowa Avenue Facility was required to give Ms. Moseley notice of the discharge. If Ms. Moseley's discharge is characterized as a discharge by the Mayor, the owner had no such obligation because the Act requires the Mayor to give the required notice. D.C. Official Code §§ 44-1003.07(a), 44-1003.08(b). If the discharge is deemed to be the facility's discharge, the Act requires notice from a "facility representative." D.C. Official Code § 44-1003.02(a). While the owner would be an appropriate representative, the Act does not mandate that the owner is the only appropriate representative. Anyone representing the facility is eligible to give notice. If, however, no one representing the facility gives notice, the discharge violates D.C. Official Code § 44-1003.02(a). In this case, Ms. Moseley did not receive notice from either a facility representative or from anyone exercising the Mayor's discharge authority; her discharge, therefore, violated either § 44-1003.02(a) or § 44-1003.07(a).

D. DMH'S Authority To Act As A Facility

The second and third issues identified in the November 26 Order raise similar questions: whether the Act's provisions governing the facility's notice obligations and the facility's authorized grounds for discharge are available to DMH. The parties have agreed that DMH's decision in July 2001 that Ms. Moseley could not return to the Iowa Avenue Facility constituted a discharge from that facility and that the Act required that she receive prior notice of that discharge. They disagree, however, about whether DMH had the authority to make that decision, and now seek a declaratory order delineating the extent of DMH's authority in the circumstances of this case.

Ms. Moseley argues that DMH has been delegated the Mayor's authority to discharge CRF residents pursuant to D.C. Official Code § 44-1003.05 and, therefore, that it can discharge a resident only for the grounds specified in that section. She further argues that none of the grounds specified in § 44-1003.05 was applicable and that her discharge therefore was invalid.

DMH agrees that it has been delegated the Mayor's authority pursuant to § 44-1003.05 and that none of the grounds specified in that section are applicable to Ms. Moseley's discharge. DMH contends, however, that D.C. Official Code § 44-1003.01(a)(1) authorized Ms. Moseley's removal from the Iowa Avenue Facility because it was "essential to meet [Ms. Moseley's] documented health care needs" Based upon the parties' stipulation that DMH operates the Iowa Avenue Facility and that DMH employees provide the entire staff for that facility, DMH further argues that, as the operator of the facility, it could rely upon the grounds for a discharge made available to a facility in D.C. Official Code § 44-1003.01.

Ms. Moseley responds that only a facility's licensee may discharge a resident in reliance upon the grounds specified in § 44-1003.01, and that the facility's owner, not DMH, holds the license for the Iowa Avenue Facility.

Deciding whether DMH can exercise a facility's discharge authority at the Iowa Avenue Facility issue requires resolution of two subsidiary issues: 1) Is the licensee the only person or entity permitted to exercise a facility's discharge authority granted in § 44-1003.01? 2) If not, is there a basis in the law for DMH to do so at the Iowa Avenue Facility? Each question is answered separately below.

1. Does the Licensee Hold Exclusive Discharge Authority?

I do not accept Ms. Moseley's argument that only a facility's licensee may exercise the facility's statutory right to discharge a resident. Nothing in the Act limits the facility's discharge authority to the license holder.⁴ Many provisions of the Act recognize that a facility's owner, licensee and administrator can be different persons or entities, and that more than one of them may act or may receive notice on behalf of the facility in connection with discharges of residents and in other circumstances.⁵ In light of this express statutory recognition that licensees, administrators and owners of CRFs all have various rights and obligations with respect to the operation of a CRF, including discharges of residents, it is unlikely that the statutory term "a facility" in § 44-1003.01(a) means that only the licensee can discharge a resident. Had the Council intended to grant the discharge right in § 44-1003.01 only to a facility's licensee, it

⁴ The regulations that govern the operation of the Iowa Avenue Facility and similar CRFs require any discharge of a resident to be "in accordance with" the Act, but do not specify who must make the discharge decision. 22 DCMR 3830.2. A separate rule requires the Residence Director of the CRF (not the licensee) to notify both DMH and the CRF's physician if a resident's physical or mental condition requires a discharge, but it does not specify who may (or may not) order a discharge. 22 DCMR 3830.1.

⁵ *See, e.g.*, D.C. Official Code § 44-1003.06(a) (licensee or administrator must receive notice of a transfer by the Mayor pursuant to D.C. Official Code § 44-1003.05; either licensee or administrator may seek an informal conference); D.C. Official Code § 44-1003.09(a) (either licensee or administrator may seek a hearing to review Mayor's decision to transfer a resident); D.C. Official Code § 44-1003.11(a) and (b) (licensee or administrator must give notice of closing, loss of license or loss of Medicare or Medicaid certification); D.C. Official Code § 44-1002.02(6) (authorizing appointment of a receiver when the insolvency of the owner or the licensee jeopardizes the continued operation of the facility); D.C. Official Code §§ 44-1002.04 through 44-1002.09 (imposing obligations and conferring rights upon a facility's licensee or administrator in receivership proceedings); D.C. Official Code § 44-1004.02 (permitting licensee or administrator to bring a mandamus action); D.C. Official Code § 44-1004.03 (prohibiting the owner, licensee, administrator or any employee from retaliating against a resident for exercising certain legal rights, including the right to make a complaint against the owner, licensee or administrator of the facility). *See also* D.C. Official Code § 44-509(d)(1) (prohibiting giving advance notice of an inspection to an owner, licensee, administrator or employee of a facility); D.C. Official Code § 44-509(e)(2) (allowing the Long-Term Care Ombudsman to intervene in administrative and judicial proceedings against the licensee or administrator of a nursing home or CRF).

would have said so explicitly, instead of using the more expansive term “facility.” *Compare* D.C. Official Code § 44-1002.03(c) (licensee may petition for the appointment of a receiver; no such right granted to owner or administrator). Indeed, the Act requires only that a “facility representative” must give notice of the discharge to the resident and the resident’s representative. D.C. Official Code § 44-1003.02(a). If the Council had intended that only the licensee could decide to discharge the resident, it is likely that it would have required the licensee to give the notice. Thus, the Act does not limit the exercise of a facility’s discharge authority pursuant to § 44-1003.01(a) to the facility’s licensee.

2. Was DMH Authorized to Rely Upon § 44-1003.01(a)?

Because § 1003.01(a) permits a “facility” to discharge a resident, the statutory definition of that term is the first place to turn in deciding whether DMH can exercise the authority granted to facilities in that section. The Act defines a “facility” as “a nursing home, Assisted Living Residence, or community residence facility operating in the District.” D.C. Official Code § 44-1001.01(6). “Community residence facility” in turn, is defined as “a facility that provides a sheltered living environment for individuals who desire or need such an environment because of their physical, mental, familial, social or other circumstances, and who are not in the custody of the Department of Corrections.” D.C. Official Code §§ 44-1001.01(3), 44-501(a)(3). Those definitions confirm that a “facility” is a place, but they do not identify the person or entity that may exercise the authority to discharge a resident granted to the “facility” in §44-1003.01(a). Nevertheless, the definitions provide an important contribution to the process for deciding who can act for the Iowa Avenue Facility in discharge matters.

The owner of the Iowa Avenue facility and DMH must act together to provide the “sheltered living environment” that is the defining characteristic of a CRF. The owner supplies the building (and perhaps the furnishings, although the record is unclear on that point); DMH provides employees to maintain the proper environment there. Because of their joint contributions to the Iowa Avenue facility’s living environment, both the owner and DMH have a material interest in the discharge process and both are likely to possess knowledge about the matters that must be considered before a facility discharges a resident. The owner receives rent from each of the residents and certainly will have a financial interest in whether a resident is discharged. DMH employees are directly responsible for the day-to-day supervision of the facility’s residents and they are likely to be in the best position to know whether many of the grounds for discharge available to a facility exist. *See, e.g.*, D.C. Official Code § 44-1003.01(a)(1) (discharge authorized if “essential to meet . . . resident’s documented health-care needs or . . . in accordance with his or her prescribed level of care.”); D.C. Official Code § 44-1003.01(a)(2) (discharge authorized if “essential to safeguard that resident or one or more other residents from physical or emotional injury”); D.C. Official Code § 44-1003.01(a)(4) (discharge authorized if “essential to meet the facility’s reasonable administrative needs and no practicable alternative is available”).

In light of their shared responsibility for providing the necessary “sheltered living environment” at the Iowa Avenue Facility, it is reasonable to conclude that either the owner or DMH *could* exercise the facility’s discharge power. Neither the statute nor any implementing regulations, however, specifies which of them actually *is* authorized to act pursuant to

§ 44-1003(a) in the circumstances of this case.⁶ Because DMH and the owner have entered into a legal relationship concerning the Iowa Avenue Facility pursuant to which each of them contributes to the creation and maintenance of the required “sheltered living environment,” it is appropriate to look to the terms of that legal relationship to find the answer to the question at issue here.

Whenever two different persons or entities share the ownership and operation of the same facility, a clearly defined division of authority between them is necessary. Third parties dealing with the facility need to know who is responsible for decisions that affect them. Residents must know to whom they owe financial obligations; vendors must know who will pay their bills; outside medical and social service agencies must know who is responsible for implementing appropriate rehabilitation plans. Such clear lines of authority also are needed when the exercise of the facility’s statutory power to discharge a resident is at issue. Residents, their families, the Long-Term Care Ombudsman and this administrative court all need to know how the owner and operator have divided that power.⁷ Consequently, in the absence of further statutory or regulatory guidance on this issue, when DMH operates a facility that it does not own, it may not exercise the additional discharge authority conferred upon facilities by the Council in § 44-

⁶ Of course, if both DMH and the owner agreed to discharge Ms. Moseley, the issue of who could exercise the facility’s discharge authority would not arise. In such a circumstance, the only parties who reasonably could be identified as the “facility” would be in agreement, and there would be no need to choose between them. In this case, however, there is no evidence that the owner of the Iowa Avenue Facility was in favor of discharging Ms. Moseley.

⁷ This is especially important when DMH is one of the parties claiming the right to exercise the facility’s discharge authority. Because DMH already exercises the separate, but limited, authority to discharge residents granted to the Mayor by the Council in D.C. Official Code § 44-1003.05, care must be taken to ensure that DMH does not exceed those statutory limits.

1003.01 unless there is a clearly-defined legal relationship between DMH and the facility's owner that affirmatively authorizes DMH to do so.

The necessary legal relationship may be embodied, for example, in a written contract with the owner or in regulations that DMH adopts to govern its operation of CRFs owned by others.⁸ Whatever form the relationship takes, it must identify specifically whether and to what extent the owner and DMH will share the facility's discharge authority. The particulars of the relationship might vary from facility to facility. For example, DMH and an owner might agree that DMH could discharge a resident in reliance upon only some of the grounds specified in § 44-1003.01(a), while the owner can rely upon the remaining grounds. Alternatively, they may agree that both of them must consent before any discharge based upon § 44-1003.01(a) may occur, or, conversely, that one of them is empowered to exercise the facility's entire discharge authority. There may be other possible ways for DMH and an owner to specify how the facility's discharge authority will be exercised. Unless they do so in a clearly ascertainable manner, however, DMH may not discharge a resident in reliance upon D.C. Official Code § 44-1003.01(a).⁹

DMH bears the burden of proof on this issue. If it seeks to act as the facility in discharging Ms. Moseley, it must be subject to all the procedural requirements applicable to a facility, including D.C. Official Code § 44-1003.03(b), which provides: "The facility shall have

⁸ There may be other methods for DMH to establish such a relationship. The examples in the text are illustrative only.

⁹ The need for a clearly ascertainable legal relationship authorizing DMH to discharge a resident arises only when DMH seeks to rely upon a facility's discharge authority pursuant to § 44-1003.01(a). Nothing in this Order should be interpreted to affect DMH's unilateral statutory authority to discharge a resident pursuant to D.C. Official Code § 44-1003.05.

the burden of proof” The stipulated record in this case contains no evidence of the required relationship, whether by contract or otherwise. Thus, there is no basis to determine whether and to what extent DMH and the owner of the facility have agreed to share in the exercise of the facility’s statutory authority to discharge residents. As a result, I cannot determine that DMH acted properly when it relied upon § 44-1003.01(a) in discharging Ms. Moseley.

In addition to the notice defects discussed above, therefore, Ms. Moseley’s discharge also was unlawful because DMH failed to prove that it properly exercised the discharge authority granted to the Iowa Avenue Facility by the Act.

E. Which Employees Can Act on DMH’s Behalf?

The final issue for decision identified in the November 26 Order is the identity of the appropriate officials or employees to act on DMH’s behalf in giving notice of a discharge. As noted above, § 44-1003.02(a) requires a “facility representative” to give notice if the facility is discharging a resident. Which DMH employees could qualify as “facility representative[s]” (and which DMH employees could make the decision to discharge a resident) can not be decided on the present record. There is no evidence of the duties and responsibilities of the various DMH employees who dealt with Ms. Moseley. Moreover, no one from DMH gave Ms. Moseley notice. Thus, the record does not present a concrete opportunity to decide whether a particular person was an appropriate “facility representative,” or, if not, whether the harmless error principle would apply if that person timely communicated a notice that contained all the information required by D.C. Official Code § 44-1003.02. Similarly, because there was no evidence that DMH had authority to act on behalf of the facility in discharging Ms. Moseley, the record does not present an opportunity to decide whether a specific employee was the proper

person to exercise any such authority. Resolution of such issues must await their presentation in a proper case.

IV. Order

Based on the foregoing findings of fact and conclusions of law, and based upon the joint request of Ms. Moseley and DMH for a declaratory order resolving, pursuant to D.C. Official Code § 2-508, whether Ms. Moseley's discharge from the Iowa Avenue Facility was lawful, it is, this _____ day of _____, 2002, **DECLARED** and **ORDERED** as follows:

1. Ms. Moseley's hearing request in this matter was timely. Because no one acting on behalf of the Iowa Avenue Facility or on behalf of DMH gave her proper notice of her discharge, the time period for challenging the discharge had not begun to run when she filed her request for a hearing.
2. Ms. Moseley's discharge was unlawful, because:
 - a. neither Ms. Moseley nor her representative received advance notice of the discharge and of her opportunity to contest the discharge, as required by either D.C. Official Code § 44-1003.02 or D.C. Official Code § 44-1003.07;
 - b. there is insufficient evidence that DMH was authorized to exercise the authority to discharge a resident that is granted to a facility by D.C. Official Code § 44-1003.01(a); and
 - c. none of statutory grounds for discharge by the Mayor listed in D.C. Official Code § 44-1003.05(a) exists; and it is further

ORDERED, that, pursuant to D.C. Official Code § 44-1003.13, any person who is aggrieved by this Order may obtain judicial review in the District of Columbia Court of Appeals in accordance with D.C. Official Code § 2-510.

/s/ **03/20/02**

John P. Dean
Administrative Judge